

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based)	WT Docket No. 02-381
Services to Rural Areas and Promoting)	
Opportunities for Rural Telephone)	
Companies To Provide Spectrum-Based)	
Services)	
)	
2000 Biennial Regulatory Review Spectrum)	WT Docket No. 01-14
Aggregation Limits For Commercial Mobile)	
Radio Services)	
)	
Increasing Flexibility To Promote Access to)	WT Docket No. 03-202
and the Efficient and Intensive Use of)	
Spectrum and the Widespread Deployment)	
of Wireless Services, and To Facilitate)	
Capital Formation)	
_____)	

COMMENTS OF T-MOBILE USA, INC.

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SUMMARY

T-Mobile shares the Commission's goal of increasing the availability of wireless service in rural areas. The Commission's current deregulatory approach promotes deployment of wireless services to rural America. The Commission should not adopt the proposed regulations of the Further Notice because they will impede future progress in this area. The Commission has generally found that wireless competition has been steadily increasing in all areas (including rural) and the record in this proceeding supports that conclusion. T-Mobile urges the Commission to permit its secondary markets rules more time to operate before considering more intrusive measures, such as "keep-what-you-use" re-licensing, "substantial service" renewal obligations, underlays, spectrum easements, or other measures that would interfere with the Commission's beneficial market-based mechanism.

The Further Notice in this proceeding acknowledges the compelling reasons for avoiding "keep-what-you-use" re-licensing. Intense competition and demand for service in the wireless market already stimulate wireless service providers to build out their licensed areas. Where it is not economically feasible for a licensee to build out, however, licensees can and often do use the Commission's secondary markets mechanisms to lease, partition, or disaggregate their spectrum. An *ad hoc* "keep-what-you-use" re-licensing scheme that ignores established build-out rules will create regulatory uncertainty that will discourage investment in the wireless sector and undermine the FCC's ultimate goal here – to get service to the rural consumer. It also will exacerbate fundamental policy concerns in rural areas, notably lack of access to capital.

For similar reasons, a substantial service requirement during renewal terms will not serve the public interest. Like "keep-what-you-use," the inevitable result of a substantial service requirement upon renewal will be to discourage investment in the wireless sector, and therefore,

delay the development of rural wireless service. This requirement would upset the regulatory certainty that now exists by clouding the legitimate renewal expectancy of current licensees.

Finally, the Commission can encourage more complete build-out in rural areas by adopting measures that are not specifically identified in the Further Notice. T-Mobile continues to urge the Commission to revamp its current universal service fund to more equitably and efficiently meet all carriers' needs in rural areas. Under the current scheme, wireless carriers pay large amounts into the USF, but they receive very limited amounts of high-cost support. The Commission should address this discrepancy as soon as possible. If the Commission makes funding more available to wireless carriers that are willing to serve lightly-populated, high-cost areas, it will encourage even more entry into these markets and consumers will enjoy the benefits. Such measures would be far superior to any of the proposals in the Further Notice.

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COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”)¹ comments on the Federal Communications Commission’s (“Commission”) September 27, 2004 Further Notice of Proposed Rulemaking (“Further Notice”) seeking comment on ways to increase the deployment of wireless services to

¹ T-Mobile is one of the largest national wireless providers in the United States with licenses covering 253 million people in 46 of the top 50 U.S. markets and currently serving 16.3 million customers. Via its HotSpot service, T-Mobile also provides Wi-Fi (802.11b) wireless broadband Internet access in more than 5,000 convenient public locations such as Starbucks coffeehouses, airports, and airline clubs, making it the largest carrier-owned Wi-Fi network in the world.

rural America.² T-Mobile shares and supports the Commission's goals of increasing the availability of wireless service in rural areas and ensuring that spectrum in these areas will be put to its highest valued use. The Commission's market-based policies have resulted in substantial progress toward this goal. T-Mobile urges the Commission to maintain its market-based, deregulatory approach to the development of wireless services in rural America.

I. IN RURAL AREAS, THE COMMISSION SHOULD CONTINUE TO RELY ON ITS EXISTING MARKET-BASED FRAMEWORK FOR WIRELESS SERVICE.

A. The Commission's Existing Rules, Not The Proposals Of The Further Notice, Best Promote Delivery Of Wireless Service To All Areas Of The Country.

T-Mobile urges the Commission not to adopt the proposals of the Further Notice. There is no policy or legal basis for the Commission to alter retroactively the build-out requirement for existing licensees. To do so would be fundamentally unfair, especially because T-Mobile and other licensees undertook to build out their networks according to the Commission's rules in effect at the time,³ making massive investments to meet those requirements successfully. Even prospectively, the proposed rule changes should not be adopted for the reasons discussed below, but under no circumstances should the Commission attempt to apply these proposals retroactively. The current licensing rules already provide strong incentives for licensees to build out in all areas where demand makes it economically feasible to do so. For example, the Commission's recent extension of the substantial service construction benchmark to all wireless

²*Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078 (2004) ("Further Notice").

³ See, e.g., 47 C.F.R. § 24.103.

services licensed on a geographic area basis will increase licensees' flexibility to develop niche and rural-focused business plans to satisfy the Commission's deployment requirements.⁴

Moreover, the Commission wisely has encouraged secondary market transactions through mechanisms such as leasing, swaps, partitioning, and disaggregation. Carriers have also entered into roaming agreements to facilitate ubiquitous service for their customers, including transfers of spectrum to rural carriers in exchange for favorable roaming rights. Secondary markets mechanisms, in particular, permit more dynamic and efficient use of otherwise underutilized spectrum in both rural and non-rural areas. Secondary markets mechanisms are efficient means of providing carriers with access to spectrum that can be used to spur rapid deployment of wireless services in lightly-populated, unserved areas.⁵ These mechanisms also enjoy support from many rural interests. In the Commission's secondary markets docket, rural interests such as the National Telecommunications Cooperative Association ("NTCA") and the Rural Telecommunications Group identified the great potential of secondary markets transactions to provide wireless services to underserved and unserved areas.⁶

The growing numbers of secondary markets transactions between wireless carriers demonstrate that the Commission's goal of ensuring that spectrum is put to its highest valued use throughout the United States is being achieved. Through its market-based competitive

⁴ Further Notice, ¶ 76. The Commission explained that such flexibility would permit licensees to provide service to less populated portions of their license territories without necessarily focusing on more urban population centers. *Id.*, ¶ 77.

⁵ In 2003, the Commission concluded that successful deployment of wireless services and the associated increase in services and competition were due in large part to "measures that the Commission has already adopted." *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Notice of Proposed Rulemaking, 18 FCC Rcd 20802, ¶ 3 (2003) ("*NPRM*").

⁶ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, ¶ 36 n.72 (2003).

framework, the Commission has found an approach that benefits all consumers and that has been instrumental in the development of a flourishing wireless sector in rural areas and elsewhere. The Commission should not undermine a market approach that is working by adopting unnecessary and intrusive regulations.

As T-Mobile explained earlier in this proceeding, the Commission's current regulatory framework has helped wireless providers meet the demand of consumers – rural and urban alike – for national service and pricing plans without the limitations imposed by small license areas.⁷ The Commission's market-oriented policies have been instrumental in achieving improved communications and competitive pricing in rural areas. These favorable results indicate that the Commission's policies are benefiting rural America, and the Commission should give these measures time to mature.⁸ As the Commission previously noted in this proceeding, both rural and non-rural consumers, as well as businesses, have benefited from the healthy competition that characterizes the wireless sector.⁹

⁷ T-Mobile Reply Comments at 5 (Jan. 26, 2004).

⁸ The Commission has been very active in addressing rural wireless issues, including the use of unlicensed spectrum, which is of special interest in wireless areas. *See, e.g.*, FCC Public Notice, *Wireless Broadband Access Task Force Seeks Public Comment on Issues Related to Commission's Wireless Broadband Policies*, 19 FCC Rcd 8166 (2004); FCC News Release, *FCC Acts to Speed Broadband Deployment in Rural America; Announces Details of Rural Wireless ISP Showcase and Workshop to be Held November 4, 2003* (Oct. 30, 2003) 2003 FCC Lexis 5993. In a recent proceeding, it has also considered elevating power levels in rural areas for unlicensed devices. *See Facilitating Opportunities for Flexible, Efficient, and Reliable Spectrum Use Employing Cognitive Radio Technologies*, Notice of Proposed Rulemaking, 18 FCC Rcd 26859 (2003).

⁹ *NPRM*, ¶ 6 (stating that “rural as well as urban consumers and businesses have benefited from our market-oriented policies.”).

B. The Commission's Own Reports Demonstrate That Rural Consumers Have Access To Multiple Competing Wireless Providers.

In 2003, the Commission found that 95% of the total United States population has access to three or more wireless providers.¹⁰ The Commission also reported that 97% of the total U.S. population live in counties in which digital wireless service is offered.¹¹ More recently, the Commission found that rural counties now have an average of 3.7 mobile competitors.¹²

Furthermore, the Commission has found that, “[w]hile it appears that, on average, a smaller number of operators are serving rural areas than urban areas, this difference does not necessarily indicate that effective CMRS competition does not exist in rural areas.”¹³ The Commission has recognized that rural areas with low population densities generally support fewer competitors than non-rural areas because of the higher costs and lower revenue potential inherent in low-density areas.¹⁴ As the Commission noted in its Ninth Competition Report, the Rural Cellular Association (“RCA”), representing many of the smallest rural wireless carriers, recently reported that there is “robust and effective competition, increasing year-to-year, in the

¹⁰ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighth Report, 18 FCC Rcd 14783, ¶ 18 (2003).

¹¹ *Id.* ¶ 78.

¹² See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Ninth Report, FCC 04-216, ¶ 109 (Sept. 28, 2004) (“*Ninth Competition Report*”). The definition of “rural” used in this report was the definition the Commission adopted in this proceeding. See *NPRM*, ¶ 11.

¹³ *Ninth Competition Report*, ¶ 111.

¹⁴ See, e.g., *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, ¶ 43 (2001) (noting that “the underlying economics appear to make it unlikely that competition in RSAs will evolve in the near term to rival that of MSAs.”) (“*2000 Biennial Regulatory Review*”).

markets served by RCA members.’”¹⁵ The Commission’s licensing and secondary markets rules have promoted such development of wireless service in rural areas.

This robust wireless competition is consistent with the Commission’s findings regarding the availability of spectrum in rural areas. As Sprint pointed out earlier in this proceeding, the Commission itself has found that access to spectrum does “‘not appear to be a substantial barrier to entry in RSAs [Rural Service Areas].’”¹⁶ Sprint also noted, “[I]n this regard, the FCC has observed because there is so much unused spectrum in rural areas, ‘the opportunity costs of rural spectrum rights is likely near zero.’”¹⁷

The Commission’s reliance on market forces allows service providers throughout the United States to operate in a competitive and efficient manner. As the Commission has pointed out, service providers are able to pass the resulting cost savings that result from these efficiencies on to consumers.¹⁸ This consumer benefit would not be possible with intrusive regulation that requires uneconomic investment.

II. “KEEP-WHAT-YOU-USE” RE-LICENSING MEASURES WILL NOT ACCOMPLISH THE COMMISSION’S OBJECTIVES.

A. The Further Notice Acknowledges Compelling Reasons For Not Adopting “Keep-What-You-Use.”

As outlined in the Further Notice, commenters in this proceeding have provided numerous persuasive reasons for declining to adopt the “keep-what-you-use” proposal of the

¹⁵ *Ninth Competition Report*, ¶ 110.

¹⁶ Sprint Reply Comments at 13-14 (Jan.26, 2004) (citing *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, 16 FCC Rcd 22668, ¶ 43 (2001)).

¹⁷ Sprint Reply Comments at 14 n.50 (citing *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 15 FCC Rcd 9219, ¶ 84 (1999)).

¹⁸ *NPRM*, ¶ 6.

Further Notice.¹⁹ Based on T-Mobile’s experience, wireless providers already have strong economic incentives to expand their service in rural areas as demand requires. With the intense competition that exists in the wireless sector, failure to do so would jeopardize a service provider’s chances of maintaining, let alone increasing, its customer base.

T-Mobile’s experience has been that when it is not economically feasible for a carrier to build out its network into remote areas, it will seek out secondary markets arrangements to lease, partition, or disaggregate its spectrum to another provider better able to serve those areas. “Keep-what-you-use” would deprive carriers of those business opportunities created through secondary markets transactions. Such transactions can benefit each of the participating carriers and its customers. If applied to existing licensees, a “keep-what-you-use” regime would unfairly force carriers that have already spent billions of dollars on developing their networks in an economically rational manner, to change their business plans. Such a result would interfere with the regulatory certainty that is a central pillar of the Commission’s market-based approach to wireless services, and, ultimately, negatively impact all wireless consumers, including those in rural areas.

B. A “Keep-What-You-Use” Re-Licensing Scheme Will Exacerbate Concerns About Lack Of Access To Capital.

In a recent NTCA survey, three quarters of the responding incumbent carriers characterized the process of obtaining funding for wireless projects as ranging between “somewhat difficult” and “virtually impossible.”²⁰ Indeed, NTCA’s survey indicates that, for its members, access to spectrum is neither the greatest nor even second greatest obstacle to the

¹⁹ *Further Notice*, ¶ 153.

²⁰ National Telecommunications Cooperative Association, *NTCA 2003 Wireless Survey Report*, at 9 (Dec. 2003), available at http://www.ntca.org/content_documents/2003WirelessSurveyReport.pdf.

provision of new services.²¹ In their own judgment, lack of access to capital is the greatest obstacle that these carriers face.²²

Not only would “keep-what-you-use” fail to improve access to capital, but, as noted above, it would reduce business opportunities and investment incentives in rural areas. Investment would likely decrease because “keep-what-you-use” could force carriers to alter their business plans to engage in uneconomic build-out to avoid “unserved” areas. Such government-mandated uneconomic build-out would raise the costs of capital and limit its availability for this sector. Carriers would also waste valuable resources and capital on the costly litigation that a “keep-what-you-use” scheme would likely spawn. As such, “keep-what-you-use” would limit access to capital, not improve it. Current licensees obtained funding for their licenses based on a clear understanding of their rights to the licensed spectrum and their potential service costs for the duration of the license term, with a settled expectation of license renewal. In contrast, imposition of a “keep-what-you-use” scheme would unsettle investor confidence in the Commission’s licensing framework. The Commission’s current market-based approach is a much more economically efficient way to address capital availability and promote build-out through business relationships, leasing, partitioning, disaggregation and roaming.

III. THE COMMISSION SHOULD MAINTAIN ITS EXISTING RULES REGARDING RENEWAL OBLIGATIONS AND REJECT AN ADDITIONAL “SUBSTANTIAL SERVICE” REQUIREMENT.

A. A Substantial Service Requirement During Renewal Terms Is Against The Public Interest.

A substantial service requirement during renewal terms would disrupt licensees’ investment incentives and could deter the development of rural wireless service.²³ Like “keep-

²¹ *Id.* at 10.

²² *Id.*

what-you-use,” the inevitable result of an additional substantial service requirement will be uneconomic investment. Existing licensees bid for their licenses with the understanding that they had rigorous build-out requirements or substantial service commitments that must be met before the end of the license term. However, existing licensees understood that once they satisfied those requirements, they could anticipate a renewal expectancy going forward. This re-licensing approach gives licensees considerable flexibility after their initial build-outs to develop market-specific business plans that suit their customers. Under the certainty provided by the Commission’s current rules for renewal, wireless service is already widely available to rural consumers, and rural wireless providers are competing to provide service in most markets at a level that meets demand. Given these positive developments, the additional renewal obligation contemplated in the Further Notice would harm the public interest by chilling carrier investment in the wireless sector.

With respect to current licensees, the Commission long ago adopted set license terms and renewal expectancies in order to create stability and regulatory certainty and to encourage investment. Current licensees developed business plans and planned their capital investment based upon the original license terms, including the renewal expectancy. In the absence of a renewal expectancy, current licensees would have bid much less for their licenses at auction and developed much different business plans.

The proposed substantial service requirement would modify the original terms of the license. Under Section 316 of the Communications Act, the Commission can modify a license only if the modification will “promote the public interest, convenience, and necessity.”²⁴ The

²³ T-Mobile is not suggesting any change in the criteria for comparative renewal proceedings. *See, e.g.*, 47 C.F.R. § 24.16.

²⁴ 47 U.S.C. § 316(a)(1).

proposed substantial service requirement fails this test. A license modification like this, which would negatively impact investment in this sector and potentially burden existing licensees, would harm the public interest.

Similarly, an additional substantial service requirement would adversely affect future licensees and the service that they otherwise would provide. With respect to the licensing of future services, a substantial service requirement for renewal would discourage investment due to the uncertainty of the obligation.²⁵ It would also introduce incentives for licensees to provide service based on the renewal requirements, however they are defined, not on the needs of the consumers who purchase the service.

IV. COMMISSION ACTION ON OTHER REGULATORY ISSUES IS NEEDED TO FURTHER BUILD-OUT IN RURAL AREAS.

The Further Notice requests comment on “other alternatives” to make spectrum available in rural areas. As T-Mobile has previously explained in this proceeding, the Commission’s efforts to encourage secondary markets transactions are preferable to untested and burdensome regulations, such as underlays and spectrum easements.²⁶ The Spectrum Policy Task Force has agreed that the Commission should not even consider alternative mechanisms, such as easements, until the Commission has fully evaluated the effectiveness of its market-based approach.²⁷

²⁵ Some incentives for broad rural wireless service already exist in the Act. In order to be designated as an eligible telecommunications carrier (“ETC”) for purposes of receiving universal service support, a wireless carrier must serve throughout a rural study area. *See* § 214(e)(5)-(6) of the Act, 47 U.S.C. § 214(e)(5)-(6). As a practical matter, wireless carriers applying for ETC status often must seek redefinition of such study areas to align them with their license areas.

²⁶ *See* T-Mobile Reply Comments at 4.

²⁷ *NPRM*, ¶ 30.

Rather than implementing the Further Notice proposals, the Commission should address more fundamental problems that now hinder the deployment of wireless service to all areas, including rural markets. A properly structured universal service fund would be more effective than the burdensome regulations contemplated in the Further Notice in assisting rural wireless providers with serving areas that would otherwise be uneconomical (*i.e.*, where market-based policies have failed). T-Mobile has already urged the Commission to replace the current universal service fund with a mechanism that would better promote economic efficiency and competition in rural areas.²⁸ T-Mobile also pointed out that wireless carriers pay a disproportionate amount into the USF.²⁹ In 2003, CMRS providers contributed 22% of the universal service funds, yet received a mere 3% of the total funding.³⁰ During the same period, LECs contributed 27% of the universal service funds and received more than 78% of the total funding.³¹ As Western Wireless previously pointed out in this proceeding, incumbent wireline carriers receive “over 95% of the federal high-cost universal service support funds, with the vast majority going to rural telephone companies.”³² This relatively heavy contribution burden depresses overall demand for wireless services, which, in turn, stifles wireless service innovation

²⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, T-Mobile Reply Comments at 12 (Dec. 14, 2004) (“T-Mobile USF Reply Comments”).

²⁹ *Id.* at 5.

³⁰ Universal Service Administrative Company, 2003 Annual Report, at 26, *available at* <http://www.universalservice.org/Reports>.

³¹ *Id.*

³² See Western Wireless Reply Comments at 2-3 (Feb. 19, 2003) (citing Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2003*, at Appendix HC01, *available at* <http://www.universalservice.org/overview/filings> (Feb. 1. 2003)).

and suppresses a potential source of competition to the rural LECs,³³ and widely available service for rural consumers.

While rural incumbent LECs reap the benefits of the current universal service fund, their wireless competitors have faced substantial delays in achieving ETC designation. The Commission should streamline the procedures under which wireless carriers can become eligible for ETC status and avoid imposing requirements that would limit access to universal service funding. To encourage further entry into the least-populated, highest-cost areas, the Commission should make funding more readily available to any wireless carrier that is willing to serve these areas.

The Commission could also better serve rural consumers and ensure the highest valued spectrum use by addressing burdensome state and local regulations on wireless carriers, rather than alter its existing market-based framework. T-Mobile and other carriers face state and local regulations that often unreasonably hinder, or even prevent, the provision of service in rural areas. Such restrictions, by forcing wireless carriers to needlessly invest in infrastructure to support their networks and limiting their ability to take advantage of the Commission's increased base-station power limits in rural areas, can effectively prevent entry into rural areas.³⁴ T-Mobile commends the Commission for increasing those power limits, but believes that state and local regulations dilute the benefits of this change. Commission action to clarify its authority and take

³³ See T-Mobile USF Reply Comments at 6.

³⁴ In Albermarle County, Virginia, a pole may not be more than 10 feet taller than the tallest tree within 25 feet of the pole. See Albermarle County, Virginia Zoning Regulations, § 5.1.40(d)(6). Similarly, Fauquier County, Virginia has an 80 foot height limit for wireless towers that applies unless a carrier can demonstrate that an exception is "technically justified." See Fauquier County Telecommunications Ordinance, §§ 11-101(2), 11-102(2)(c).

action against such burdensome and unreasonable regulation would be of far greater benefit to rural America than the proposals of the Further Notice.

V. CONCLUSION

T-Mobile applauds the Commission for setting the proper course for wireless development in rural areas. The Commission should continue on that course with respect to its market-based regulatory framework and decline to adopt the proposals of the Further Notice. Furthermore, the Commission should allow carriers to take advantage of the efficiencies of the secondary markets rules in rural areas before it even considers doing harm to the policy basis for those rules. The proposals of the Further Notice would result in uneconomic investment, raise costs for all wireless consumers, including rural consumers, and ultimately stall deployment of additional wireless services in rural areas. Rather than adopting these harmful proposals, the Commission should refocus its efforts to promote rural wireless service by addressing the more immediate, pressing obstacles to more rapid deployment of wireless services in rural markets.

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